IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-693

GENERAL FOODS CORPORATION, *Petitioner,*

v.

WILLIAM E. GREENE, d/b/a
WILLIAM E. GREENE FOOD DISTRIBUTORS, *Respondent.*

PETITIONER'S REPLY BRIEF

PAUL C. WARNKE
CARSON M. GLASS
ROBERT A. ALTMAN
CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
815 Connecticut Avenue
Washington, D. C. 20006

Of Counsel:

MICHAEL J. QUILLINAN
White Plains, New York 10602

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PETITIONER'S REPLY BRIEF

The Brief in Opposition filed by Respondent does not take issue with Petitioner's contention that this case raises important, unsettled questions of antitrust law which have far-reaching impact on the distribution patterns of American industry. Nor does it convincingly reconcile the decision of the Fifth Circuit in this case with the rulings of the Third and Tenth Circuits in *Goldinger* v. *Boron Oil Co.,* 375 F. Supp. 400 (W.D. Pa. 1974), *aff'd without opinion,* (3d Cir. Mar. 7, 1975), *cert. denied,* 44 U.S.L.W. 3202 (Oct. 6, 1975), and *American Oil Co.* v. *McMullin,* 508 F.2d 1345 (10th Cir. 1975), respectively.

Respondent asserts that General Foods Corporation's ("General Foods") distribution system constituted an illegal resale price maintenance scheme because: (i) Greene was an independent distributor of General Foods products; (ii) Greene was not an employee of General Foods; and (iii) Greene held legal title to the products which he distributed. In the context of this case, these factors are neither controlling nor an answer to the serious questions of antitrust law that are raised by the Petition. Respondent has failed directly to address, much less refute, the basic argument advanced by Petitioner that Greene distributed General Foods products in two distinct legal capacities: first, as an independent wholesaler purchasing for his own account for resale to his own customers and, second, as a delivery and servicing agent who filled orders from his stock on sales made directly by General Foods to its own customers.*

General Foods does not dispute the fact that Greene acted as an independent distributor when making sales to his own "down-the-street" accounts. The independent distributor role, however, was only one capacity in which Greene served. When Greene took orders and made deliveries to MFSA accounts, he was not acting as an independent distributor, but as an agent of General Foods.

Nothing in the antitrust law prohibits a manufacturer from contracting with a distributor to serve as an agent filling orders on sales made directly by the manufacturer to its own national accounts. *See American*

* The instruction requested by General Foods regarding Greene's agency status when dealing with MFSA accounts was denied by the District Court.

Oil Co. v. *McMullin, supra,* and *Goldinger* v. *Boron Oil Co., supra.* Nor is that arrangement converted into illegal resale price fixing because the distributor's contract also permits him to purchase products for his own account for resale to his own customers. In the *McMullin* case, the Tenth Circuit thus distinguished plaintiff's sales activities in his capacity as an "employee-agent" from those as an "independent dealer." 508 F.2d at 1351-52. Respondent purports to explain away the *McMullin* holding on the ground that Greene's "operation is not divided into wholesale and retail segments." This distinction is neither a relevant consideration nor was it relied upon by the Court of Appeals.

Respondent emphasizes the fact that Greene held title to the goods which he delivered to MFSA accounts. In the *McMullin* and *Goldinger* cases, the manufacturer did retain legal title to the products. As we pointed out in our Petition, however, a finding of illegal resale price maintenance should not properly turn on the technical question whether legal title to the goods did or did not pass as a matter of contract law, but rather should depend on substantive economic considerations—whether the party establishing the price was the party subject to the economic risks of the marketplace when making the sale.

The Right to Jury Consideration of an in pari delicto or Related Equitable Defense

Respondent now concedes that the defense of *in pari delicto* may have vitality in antitrust actions but argues that the evidence and stipulations entered into at trial properly barred its use. We note that in denying General Food's requested jury instruction on this issue, the District Court specifically ruled the defense in-

applicable as a matter of law, not because of stipulated facts or any evidence of record. Further, the stipulations quoted in the Brief in Opposition basically describe the mechanics of the MFSA program and are not concerned with its initial formulation, later implementation, or the ready willingness of Greene to participate in this program as an additional profit center of his business.

The trial court's action, approved by the Fifth Circuit, is in direct conflict with the practice of other Circuits. Other Courts of Appeals which have considered the use of an *in pari delicto* defense subsequent to this Court's decison in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), have held that the successful interposition of the defense depends on factual questions that must be resolved at trial. Here the Fifth Circuit found that "Greene knowingly participated in the MFSA program" but stated that whether "he was a 'willing' participant is less clear . . . ." 517 F.2d at 646. General Foods was entitled to have the jury definitively decide whether Greene was a "willing participant" and not be compelled on this factual question to accept the inconclusive answer of the appellate court.

The Brief in Opposition understandably has attempted to minimize Greene's long involvement in the MFSA distribution program. It is undisputed that Greene was a distributor for General Foods when this system was developed, fully participated in the system for nearly 17 years and made substantial profits as a result of this arrangement. In view of these facts, it was legally improper for the District Court to rule as a matter of law that the defense of *in pari delicto*

was unavailable. It is clear that the federal judiciary needs Supreme Court guidance as to the proper use of this defense in private antitrust actions.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PAUL C. WARNKE
CARSON M. GLASS
ROBERT A. ALTMAN
CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
815 Connecticut Avenue
Washington, D. C. 20006

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MICHAEL J. QUILLINAN
White Plains, New York 10602